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THE CANADIAN CONSTITUTIONAL TRADITION
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LEGAL THOUGHT IN THE LATE NINETEENTH CENTURY

Our major topic is constitutional thought, but we need to have some knowledge of trends in legal thought generally, and the purpose of this note is to provide some of this knowledge about the beginning point: the late nineteenth century.

During the second half of the century, a widely shared way of thinking about such topics as the nature and proper functions of legislatures and courts, and the appropriate materials and ways of legal reasoning became dominant among lawyers in England, the United States, and Canada. For England and Canada, this way of thinking was expressed primarily by scholars, especially a small group at Oxford that included William Anson, Albert Venn Dicey, William Markby, and Frederick Pollock. Its basic elements were the equality and autonomy of individuals (and legal entities generally), a division between the public and private realms, and the paramountcy of the common law and the courts. Legal reasoning was distinctive, and sharply separated from politics and context. Of course, this description is a model, and even as a model, it is greatly simplified. The minds of individual lawyers were much more complex and muddled, and included inconsistent elements, and there were differences among individuals and between generations, and between practising lawyers and the profession.

It is useful to continue here with an account of the beliefs about the common law, for it was the core of these lawyers' thought and their legal world. We shall look at Canadian lawyers. They wrote very little about the general nature of the common law, either by way of description or critical inquiry, so the major source must be the brief, fragmentary comments in book reviews and editorials in the law journals. The tone of this writing, and perhaps its very scarcity, suggest that these beliefs were untroubled and widespread. Throughout, it demonstrated an immense pride in an ancient body of law and procedures, which had given justice and liberty for centuries to the English people, and continuously adapted itself to their changing needs.

A collage of the beliefs emerges from these fragments. The basic elements of the common law were its principles - the "pillars that support the building." For example, at the opening ceremonies for the revitalized Osgoode Hall law school, the new principle, Reeve, spoke of "the great fundamental principles of Law" (he meant the common law), and declared that the chief function of the school was "the cultivation of the right understanding of legal principles," for the purpose of applying these principles to the manifold problems of clients. These principles, or at least the major ones, had changed in response to the changing needs of their society, albeit slowly, and more in the distant past than recently. In deciding individual cases, judges reasoned

from these principles, and applied them to the particular facts before them, and once decided, the cases became both applications and illustrations of the principles. As well, decided cases were precedents that future courts were obligated to follow. In reasoning in this way, the only permitted materials were the principles and the cases. A judge might, perhaps, be influenced by personal values or some element of the social context, but this was simply a mistake - as though a sign in a mathematical calculation had been ignored or misread. The role of the judges was objective and apolitical; they had no discretion, or, whatever discretion they had must be exercised according to law. This common law was often and with pride called a science, although term seemed to have little bite, meaning little more than functional organization and internal coherence of doctrine, and sometimes a contrast to practical or day-to-day practice.

This collage contained uncertainties and tensions. What was the nature of the principles? Doubtless, they were they general guides, such as "sic utere tuo ...", but were they firm rules as well, such as the detailed doctrines about interests property? Where did they come from? The usual belief or working assumption was that they were derived from the decided cases. But was the process of making principles and deciding cases simply circular: were the principles were derived from cases, and the cases were decided by applying the principles. If individual cases were binding, should a judge follow the case or an inconsistent principle? And change how could law change and how could it embody values, such as liberty and bodily security, if the decided cases alone and were the sources of the principles and must determine the results of disputes?

Some of these questions, for example, the nature of change and the role of judges, were manifestation of grand questions that had endured for centuries. More important for our purposes, some were caused by changes in legal thought in England to which Canadian lawyers were unhesitatingly faithful. During the nineteenth century, especially in its second half, positivism became the dominant jurisprudence, together with a tendency to think of the common law as a set of rules rather than a set of procedures for deciding individual disputes by drawing on the collected wisdom of the community. At the same time individual cases became binding, and analysis of cases crowded out other considerations. In thinking about doctrine and writing texts, a strong drive towards synthesis of subjects replaced the tangle of the forms of action.

Apart from the the brief, fragmentary comments from which this collage is made, the bulk of the routine writing about the common law, expositions and debates about doctrine in articles and texts, prize winning essays, and lectures to law students, were composed virtually entirely of analysis of cases. Moreover, the analysis tended to take the form of a case by case accumula-

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tion, rather than integration and synthesis. The standard of correctness or winning a debate was consistency with the cases, or the majority of them, and the differences of opinion were about the accuracy of different readings of the cases. Context or values were never considered, although they were occasionally expressly declared to be irrelevant.

The only Canadian lawyer who wrote at any length about the common law was A.F.N. Lefroy, whom we will see again, in considering federalism. His thought was typical of this late nineteenth century thought. Throughout his writing, the work of the courts in applying the settled common law appeared to be objective and apolitical. They found facts and applied the appropriate general rule, and the scientific process ensured that there would be only one appropriate rule, even though determining it might be difficult and debatable. This common law was autonomous, although this concept does not mean that Lefroy believed the law did not express values about society, for he clearly did: the sources from which it was made were all statements of values, but they all seemed to be abstract and independent from their immediate context of place and time. There was no suggestion in any of the examples of law-making that there was a choice between social interests or classes at stake.

This autonomy was fortified by a sense that lawyers, especially judges, were the custodians of the legal science and the process of making law from these values and applying it. It was probably also related to the explanation for the rule that settled law could not be changed. Considering change, conceived as anything different from correcting a error in reasoning, would involve considering some particular social and political context, and might ultimately suggest that the common law and its basic principles were contingent upon the conditions of each society.

Lefroy's positivism, his faith in precedent, and his general understanding of the common law all might have been found in any common room or text in England. His major effort and his claim to distinctiveness was his discussion of law-making. How could judges make law, and also be objective and apolitical? Most thinkers of his generation considered this problem, perhaps because the dominant positivism had made it pressing. Lefroy found the resolution in the process of reasoning from the basic principles and understandings. The courts did not declare their own personal wills or choices. Instead their work was "discovering the implications and equities inherent in the transactions and relations of mankind," and declaring "the law's intention" that was embodied in the terms of the broad principles.